

nes beyond the scope of this arti-
r concern.

THE COMMON LAW AND THE JUDICIAL DECISION-MAKING PROCESS

STANLEY MOSK*

1988

Lamin
Articles

TWO PART

BRANSON

arts. p. 592, 36T
670, 662

This paper is about the judicial decision-making process. It is not limited to the common law because most American jurisdictions are now code states. That means that their laws are codified—anyone can find them in a book. The California legislature and most other legislatures, however, have declared that whenever the codified law does not cover a subject, the common law shall prevail. Thus, we look on occasion not only to our codes, but also to the common law, and sometimes back to its origins in England.

But the common law is not static. It is adaptable to changing conditions. For example, in *Rodriguez v. Bethlehem Steel Co.*,¹ the California Supreme Court faced the issue of a wife suing for loss of consortium. Her husband, through the alleged negligence of the defendant, had been reduced to a limp vegetable. The wife contended that as a result of this negligence her role had been altered for the remainder of their lives from wife to nurse.

The common law developed during an era when a wife was merely the chattel of a husband. She had no personal rights other than those existing vicariously through her husband. A majority of the states, including California, abandoned that subservient role for wives, overruled past precedent, and held that a wife did have a right to claim a loss of consortium.² The California Supreme Court, in joining these states, observed that the common law is not a codification of exact or inflexible rules for human conduct, the redress of injuries, or protection against wrongs, but is rather the embodiment of broad and comprehensive unwritten principles. It is inspired by natural reason and an innate sense of justice, and adopted by common consent for the regulation and government of the affairs of men.³

* Associate Justice, California Supreme Court. This article is a lightly edited transcript of Justice Mosk's remarks at the Federalist Society Symposium on January 30, 1987.

1. 12 Cal. 3d 382, 525 P.2d 669 (1974).

2. 12 Cal. 3d at 408, 525 P.2d at 686.

3. See 12 Cal. 3d at 398, 525 P.2d at 682-83.

The inherent capacity of the common law for growth and change is its most significant feature. It is constantly expanding and developing to keep up with the advancement of civilization and the new conditions and progress of society, and adapting itself to the gradual changes in trade, commerce, arts, inventions, and the needs of the country. As the United States Supreme Court has aptly said, "This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law."⁴ The vitality of the common law can flourish if the courts remain alert to their obligation and have the opportunity to change it when reason and equity so demand. The common law requires that each time a rule of law is applied, it must be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of the rule an instrument of injustice. Although the legislature may speak to the subject, in the common law system the primary instruments of legal evolution are the courts.

Another example is *Manjares v. Newton*,⁵ which involved a school board that provided transportation for all pupils in rural districts except for ten students living in one rural area. This action by the board clearly discriminated against those ten students. The California Supreme Court could have decided the case based on constitutional violations—equal protection, or perhaps due process—but simply declared that there was an abuse of administrative discretion. On the other hand, the Court could have looked back to English common law, and found a duty to serve. Professors Charles Haar of Harvard and Daniel Fessler of the University of California at Davis recently wrote a book, *The Wrong Side of the Tracks*,⁶ in which they tracked this common law duty back to land use law in the Thirteenth Century.

Many of those early cases involved ferries, and an obvious necessity for getting from here to there when there was an intervening body of water and no bridges. If the ferry operator enjoyed a monopoly and suspended service or charged excessive fees, a serious impact on the economic life of the area would result. Thus, there was born a principle that enterprises

4. *Hurtado v. California*, 110 U.S. 516, 530 (1884).

5. 64 Cal. 2d 365, 411 P.2d 901 (1966).

6. C. HAAR & D. FESSLER, *THE WRONG SIDE OF THE TRACKS* (1986).

providing essential services to the public have a common law duty to serve—an affirmative obligation to provide all citizens within their geographic area equal, adequate and nondiscriminatory access to those services.

In modern application, if a school board elects to provide transportation for its pupils, it cannot deny bus service to some of them, barring unusual circumstances. If a utility is given a monopoly to provide electricity to your city, it cannot provide service to every house on your block except yours. It has a common law duty to serve all.

It is a small jump from this principle to the result reached by the California Supreme Court in the *Bakke*⁷ case. I had the opportunity to write the *Bakke* opinion for the Court, and I still believe the result was better than that reached by the United States Supreme Court. Allan Bakke applied for admission to the medical school at the University of California at Davis, and was rejected in favor of a number of minority applicants whose objective qualifications were inferior. The justification for denying him admission was the existence of a quota system that set aside a rigid percentage of admissions for minorities. The California court held three things: (1) Mr. Bakke had to be admitted, (2) the quota system was invalid, and (3) race could not be considered as factor in determining admissions to a public university. The United States Supreme Court agreed with us on points one and two, but Justice Powell, writing for a majority of five, held that race could be one of many factors in the evaluation process.⁸

If I were writing the *Bakke* opinion today, I would seriously consider adapting the common law duty to serve. The University of California at Davis is a public institution financed by the taxpayers, and it must adhere to its duty to serve not only without discrimination against, but also without discrimination in favor of, any person because of his ethnic origin.

Does this mean an end to affirmative action? The answer is no, if one does not give an overexpansive definition to affirmative action and deem quotas to be affirmative action. The proper role of society is to take reasonable steps to equip all persons, particularly youngsters, for life's competition. If more

7. *See Bakke v. Regents of the Univ. of California*, 18 Cal. 3d 34, 553 P.2d 1152 (1976), *aff'd in part and rev'd in part*, 438 U.S. 265 (1978).

8. *See Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).

training is required for some because of racial or linguistic barriers, or because of the handicap of physical, family, or economic disability, then more training should be given to them. But once the competition begins for jobs, for promotions in employment, or for educational opportunity at the higher levels, everyone must compete on the basis of complete equality. No one should get out of the starting blocks ahead of the others in a democratic society.

I have spoken of the common law as if there is a readily ascertainable body of law; let me now revert to the views of Oliver Wendell Holmes. If there is some variance in my concepts, I suggest that judges are occasionally entitled to the luxury of inconsistency. I agree with Mr. Emerson that a foolish consistency is the hobgoblin of little minds.⁹

Justice Holmes wrote in 1928:

Books written about any branch of the common law treat it as a unit, cite cases . . . and criticize them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts . . . might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.¹⁰

Then, of course, there is the most famous Holmesian quotation from an earlier case, *Southern Pacific Co. v. Jensen*:¹¹ "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be

9. "A foolish consistency is the hobgoblin of little minds, adored by little statesmen, philosophers and divines." R. W. EMERSON, *Self-Reliance*, in *ESSAYS BY RALPH WALDO EMERSON* 41 (1961).

10. *Black and White Taxicab Co. v. Brown and Yellow Taxicab Co.*, 276 U.S. 518, 533-34 (1928).

11. 244 U.S. 205, 222 (1917).

identified; although some decisions . . . seem to me to have forgotten the fact."¹²

If Justice Holmes is right, and there really is no common law that we can put our fingers on, then what is the governing law? Is it the view attributed to Charles Evans Hughes, that staunchly conservative Republican, that the law is what the judges say it is?¹³ I hope not, and I think not. Some courts and some judges occasionally forget it, but the law is what the representatives of the people say it is—the congress for the country, the legislatures for the several states.

That doctrine is what distinguishes our country from others in this troubled world. I am reminded of a capsule lesson in social science I heard recently:

In England everything is permitted except that which is prohibited.

In Germany, everything is prohibited except that which is permitted.

In Italy, everything is permitted including that which is prohibited.

In Russia, everything is prohibited including that which is permitted.

In this country, the distinction is often blurred between that which is permitted and that which is prohibited—and often it does not seem to make much difference.

Actually, that is why I consider myself to be a federalist. I believe our Founding Fathers created a limited national government. An American is permitted to do everything except that which is prohibited, and the permissible prohibitions by the federal government are limited by the caveat of James Madison:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation and foreign commerce; with which the last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of

12. *Id.* at 222 (1917).

13. Address by C. Hughes, Elmira, N.Y. (May 3, 1907) ("We are under a Constitution, but the Constitution is what judges say it is . . .").

the State.¹⁴

Before I ramble too far afield, let me return to the role of the judge. It is difficult to know just what society expects of a judge today. I say, "today," but perhaps the ambiguity has existed for our 200 years of independence. The iconoclast H.L. Mencken wrote on this subject in the *American Mercury* more than a half century ago, in a 1930 article I chanced to run across recently. Said he:

The average American judge, as everyone knows, is a mere rabbinical automaton, with no more give and take in his mind than you will find in the mind of a terrier watching a rathole. He converts the law into a series of rubber-stamps, and brings them down upon the scaled skulls of the just and unjust alike. The alternative to him, as commonly conceived, is quite as bad—an uplifter in a black robe, eagerly gulping every new brand of [porridge] that comes out, and converting his pulpit into a sort of soap-box. Mr. Justice Holmes was neither, and he was better than either. He was under no illusions about the law. He knew very well that its aim was not to bring in the millennium, but simply to keep the peace.¹⁵

Is a judge merely to keep the peace? I prefer a judge's role to be that of the master both of the microscope and of the telescope. He must look at the letter of the law, but he must also look to the pattern of the law.

There are constant debates, particularly in multi-judge courts, as to whether they are courts of law or courts of justice. Unfortunately the two are not always identical. For example, one may have a perfectly valid claim on a contract. He should win a judgment in a court of justice, but statutes require that he bring his lawsuit within four years. One day over four years and he loses his just claim in a court of law.

Let me conclude these remarks with reference to a commonly recurring misunderstanding these days. There is a substantial portion of society that expects courts to be responsive to public opinion. The executive branch of government and the legislative branch of government must harken to the will of the majority, why not the third branch of government, the judiciary? Don't the taxpayers pay judicial salaries? But do we really want a judge to decide the innocence or guilt of an individual,

or whether the constitutionally guaranteed rights of an unpopular religious, political or racial group are to be curtailed, on the basis of public opinion? I would suggest that courts must be prepared to protect the rights of an individual against public opinion.

It will be a sad day for individual merit in this country if a judge feels he must take a poll of public opinion before rendering a judgment. If that day comes, let's put George Gallup on the Supreme Court and we will get public opinion with reasonable accuracy. Judges must be fearless and independent, unafraid of applying the Constitution and laws to the least among us. That, I believe, is what was contemplated by those who fought British tyranny and then fashioned our Constitution two centuries ago.

14. THE FEDERALIST No. 45, at 292-93 (J. Madison) (C. Rossiter ed. 1961).

15. See *The American Mercury* (1930).